

# DECISION



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THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D.C. 20548

FILE: B-205126

DATE: June 17, 1982

MATTER OF: Panama Canal Commission - Applicability of  
Overtime Pay Limitation - Waiver

- DIGEST: 1. Administrator of the Panama Canal Commission requests a decision as to the applicability of the limitation on overtime pay contained in 5 U.S.C. § 5542(a)(2) to employees of the Commission who were formerly paid without regard to that limitation because they were covered by Fair Labor Standards Act. Section 1231 of the 1979 Panama Canal Act states that employees transferred from the Panama Canal Company or the Canal Zone Government to the Commission shall have terms and conditions of employment which are generally no less favorable than prior employment terms and conditions. However, Congress specifically intended to exclude all Commission employees from coverage of the Fair Labor Standards Act and the terms and conditions of employment are otherwise generally the same since the employees still receive overtime under the provisions of 5 U.S.C. § 5542. Accordingly, overtime payment must be made in accordance with title 5 requirements, including the limitation contained in 5 U.S.C. § 5542(a)(2).
2. The Administrator of the Panama Canal Commission requests that we grant waiver of repayment of overpayments made because of an agency error in failing to follow the limitation on overtime contained in 5 U.S.C. § 5542(a)(2). Waiver may be granted for overpayments made before notice of this decision since the employees who received the payment did so in good faith and with no knowledge that they were erroneous. Collection of the erroneous overpayments would be against equity and not in the best interest of the United States.

Mr. D. P. McAuliffe, Administrator, Panama Canal Commission (Commission), has requested our decision on two issues concerning overtime pay for employees of

the Commission. The first issue involves the applicability of the overtime pay rate limitation in 5 U.S.C. § 5542(a)(2) (1976), to employees of the Commission. We hold that the limitation in 5 U.S.C. § 5542(a)(2) is applicable to employees of the Commission. The second issue involves whether collection of payments made in excess of the limitation in 5 U.S.C. § 5542(a)(2) may be waived. Under the circumstances described by the Administrator, such overpayments made prior to notice of this decision may be waived.

#### APPLICABILITY OF OVERTIME PAY LIMITATION

Prior to October 1, 1979, employees of the Panama Canal Company and the Canal Zone Government were eligible to be paid overtime pursuant to either the overtime provisions of 5 U.S.C. § 5542(a), or the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-219 (1976), whichever provided a greater payment. The overtime pay rate of employees whose basic rate of pay exceeds the minimum rate of basic pay for GS-10, is limited by 5 U.S.C. § 5542(a)(2) to one and one-half times the GS-10 minimum rate. Therefore, prior to October 1, 1979, employees of the Panama Canal Company and the Canal Zone Government who earned more than the GS-10 minimum were generally paid overtime in accordance with the FLSA, which allows the full time and one-half overtime payment.

The Panama Canal Act of 1979 was enacted to implement the Panama Canal Treaty of 1977. The Act established the Panama Canal Commission to perform many of the functions of the disestablished Panama Canal Company and Canal Zone Government. Panama Canal Act of 1979, Pub. L. No. 96-70, September 27, 1979, 93 Stat. 452, 22 U.S.C. §§ 3601 et seq., (Supp. III 1979). Effective October 1, 1979, many of the employees of the Panama Canal Company and the Canal Zone Government were transferred to the Commission. The Panama Canal Act also amended the FLSA (29 U.S.C. § 213(f), (Supp. III 1979)) by deleting a reference to the Canal Zone as a territory or possession in which the FLSA applied. Pub. L. No. 96-70, § 1225(a), 93 Stat. 468. Therefore, the Commission contends that the FLSA no longer applies to its employees and overtime can

only be paid in accordance with 5 U.S.C. § 5542, and that the limitation in 5 U.S.C. § 5542(a)(2) is applicable.

Employees of the Commission contend that, although the FLSA no longer applies to them, overtime payments under title 5 should not be limited by 5 U.S.C. § 5542(a)(2). Their argument is based on section 1231 of the Panama Canal Act of 1979, 93 Stat. 468, 22 U.S.C. § 3671(a)(1), which provides that, with regard to employees transferred from the Canal Company or the Canal Zone Government to the Panama Canal Commission, " \* \* \* the terms and conditions of employment \* \* \* shall be generally no less favorable, on or after the date of the transfer [October 1, 1979] \* \* \* than the terms and conditions of employment with the Panama Canal Company and Canal Zone Government on September 30, 1979 \* \* \*." The terms and conditions to which this section applies are listed and include premium pay. Pub. L. No. 96-70, § 1231(a)(2)(C), 93 Stat. 468.

The Commission analyzed this problem and concluded that the overtime statute, 5 U.S.C. § 5542, and section 1231 of the Panama Canal Act were in conflict. The Commission then used the statutory construction rule that a specific provision (5 U.S.C. § 5542) should govern over an inconsistent general provision (section 1231). The Commission reasoned that 5 U.S.C. § 5542 specifically covers overtime, while section 1231 only mentions premium pay which includes overtime, Sunday and holiday pay. The Commission also concluded that the words "generally no less favorable" in section 1231 set forth a more general rule. Therefore, since the specific statute prevails, it concluded that the employees are subject to the 5 U.S.C. § 5542(a)(2) limitation.

Although we agree with the Commission's result, we believe that a different analysis also may be used to reach that result. Our alternative analysis is that the two statutes are not inherently in conflict and if the statutes are interpreted along with section 1225 of the Panama Canal Act a congruous result can ensue. By passing section 1225 of the Panama Canal Act, Congress clearly intended that employees of the Commission not be covered by the

Fair Labor Standards Act. See H.R. Rep. No. 96-473, 96th Cong., 1st Sess. 58, reprinted in 1979 U. S. Code Cong. & Ad. News 1140. Here employees of the Commission are arguing that they are now getting less favorable terms and conditions of employment because higher level employees are not getting paid overtime at time and one-half of their pay rate. The statute that guaranteed higher level employees time and one-half at their pay rate was the FLSA and not 5 U.S.C. § 5542. After the passage of the Panama Canal Act of 1979 the employees are still getting the same rights under 5 U.S.C. § 5542 as they had before the Act was passed. The terms and conditions that these employees are working under are now different not because of the limitation in 5 U.S.C. § 5542(a)(2), but because Congress exempted these employees from coverage by the FLSA. Therefore, even if higher level employees do not get paid overtime at time and one-half of their pay, the employees rights under 5 U.S.C. § 5542 are not generally less favorable than before the Act was passed. Therefore, these statutes can be interpreted together to reach the same result the Commission reached, that employees of the Commission are subject to the limitation in 5 U.S.C. § 5542.

#### WAIVER OF ERRONEOUS PAYMENTS

The Administrator of the Commission has informed us that overtime payments have been made to employees in excess of the limitation in 5 U.S.C. § 5542(a)(2). He also indicates that some overpayments of overtime are still being made. The Administrator requests that we waive collection of these overpayments because the overpayments occurred through an administrative error and there is no indication of fraud, misrepresentation, fault or lack of good faith on the part of the employees concerned. Under the authority granted in 5 U.S.C. § 5584, we hereby waive collection of the overpayments for the following reasons.

The provision of law authorizing the waiver of a claim of the United States arising out of an erroneous payment of pay or allowances, 5 U.S.C. § 5584 (1976), permits waiver when the collection of the erroneous payment would be against equity and good conscience and not in the best interests of the United States and then

only when there is no indication of fraud, misrepresentation, fault, or lack of good faith on the part of the employee, or any other person having an interest in obtaining the waiver.

In this case, the erroneous payments resulted when the Commission interpreted a recent statute incorrectly and permitted payment for overtime above the limitation contained in 5 U.S.C. § 5542(a)(2). As discussed previously, the employees who claimed that they could receive overtime payments in excess of the limitation in 5 U.S.C. § 5542(a)(2) based their argument on another section of law. Although by this decision we have held that such payments are erroneous, at the time the payments were made the employees involved legitimately believed that such payments were proper. The Commission had doubts concerning the legality of such payments, but they continued to make them.

This case is similar to the situation in B-203478, December 30, 1981, where we granted waiver of repayment of erroneously paid Senior Executive Service (SES) bonuses. In that case, the International Trade Commission misinterpreted a recent law and awarded two SES bonuses when they should have only awarded one. We granted waiver because collection of the erroneous bonus would be against equity and good conscience and not in the best interest of the United States.

Here, since the Commission has determined that the employees who received the erroneous payments did so in good faith and with no knowledge that it was erroneous, collection of the erroneous payments would be against equity and good conscience and not in the best interest of the United States. Therefore, the erroneous overpayments in excess of \$500 are hereby waived. The submission states that the Commission will waive all claims under \$500 if we waive the larger overpayments.

The Commission should also take the necessary administrative steps to make sure that the erroneous overpayments do not continue, and waiver should not be granted after notice is received.

*Harry K. Van Cleave*  
for Comptroller General  
of the United States